IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 427

VIRGINIA PETROLEUM JOBBERS ASSOCIATION, *Petitioner*

v.

FEDERAL POWER COMMISSION, ET AL., *Respondents*

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To The Honorable, The Chief Justice of the United States and The Associate Justices of the Supreme Court of the United States:

Pursuant to Rule 58 of the Rules of this Court Virginia Petroleum Jobbers Association petitions this Court for a rehearing of its Order of December 11, 1961 denying the issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-styled cause on June 22, 1961. *Virginia Petro-*

leum Jobbers Association v. *Federal Power Commission, et al.*, 293 F. 2d 527 (1961).

The ground for this Petition is the Memorandum Opinion of Mr. Justice Black, in which Mr. Justice Douglas joined, dissenting from the Order denying certiorari. It appears from that opinion that this Court misapprehended the issue raised by the Petition for a Writ of Certiorari. Mr. Justice Black phrased the question presented as follows:

> ". . . whether the Federal Power Commission has authority to refuse to summon a witness to testify to relevant facts in a hearing before it on the ground that the party summoning that witness refuses to compensate him as an expert witness over and above the amount authorized to be paid witnesses in courts under 28 U.S.C. Sec. 1821." —— U.S. ————, 30 L.W. 3194.

We respectfully submit that this is not the question. Petitioner at no time refused to compensate the witness whose testimony it sought as an expert. In fact, in its Petition for Certiorari, Petitioner, noting that it might be burdensome on an expert to testify at a lay witness' fee, took the position that both the Commission on a motion to quash the subpoena, and the Court in a proceeding to enforce it, would have authority to impose appropriate conditions respecting compensation (Pet. for Cert. pp. 17-19). And in its Brief in opposition to certiorari the Commission pointed out that Petitioner was not contending "that the Commission acted unreasonably in declining to force the expert to testify at the same compensation accorded a lay witness, . . ." (Br. p. 6).

The Commission's denial of a subpoena was squarely based on its view that one seeking the testimony of an

expert must "arrange for compensation to be paid to him as an expert witness *and for his voluntary attendance at the hearing.*" (R. 172, emphasis supplied). In other words the Commission held that as a matter of policy it would not compel expert testimony. This is clear from the Briefs to, and the opinion of, the Court of Appeals. Petitioner in Brief stated the question presented as follows:

> "Can the Federal Power Commission deny an application for a subpoena on the ground that the witness is an expert and that his evidence, although relevant and material, would be about matters which had come to his knowledge in his capacity as an expert?"

The Commission in Brief made a counterstatement of the question presented as follows:

> "May the Federal Power Commission decline to issue compulsory subpoena for the production of expert opinion testimony?"

In argument in its Brief to the Court of Appeals (pp. 8-10) the Commission defended its order denying a subpoena on the grounds that it was free "to fashion its own body of evidentiary law uniquely suited to its peculiar regulatory problems so long as the rulings are reasonable and they are applied without discrimination", and that the rule it had adopted was reasonable notwithstanding that it was contrary to the majority rule, adopted in the District of Columbia Circuit in *Bradley* v. *Davidson*, 47 App. D.C. 256 (1918). It argued that "the mere fact that the Commission has followed a rule different from the one that prevails in [the District of Columbia] Circuit does not mean that the Commission *practice* is unreasonable." (Em-

phasis supplied). Pointing to cases from Massachusetts and New York that it interpreted as applying the rule it adopted, the Commission said:

> "The fact that two such highly regarded state-court systems . . . are in accord with the Commission *practice* is well-nigh conclusive evidence of its reasonableness." (Emphasis supplied).

The Court of Appeals clearly affirmed the Commission's holding that its practice of refusing to issue subpoenas for expert testimony was reasonable. While it noted that it had held that such testimony could be compelled by subpoena in a civil case, it also noted that other courts had taken the contrary view and concluded that it could not "deny the Commission its choice between these views on what is essentially a procedural matter . . . . To extend the reach of the *Bradley* case to the administrative process would unduly encroach on matters more appropriately left to the experienced discretion of the agency." (Pet. for Cert. App., p. 3a).

From the foregoing it is plain that the question before this Court is not whether the issuance of a subpoena for expert testimony can be conditioned upon an undertaking by the applicant therefor to make appropriate compensation to the witness. Rather it is a broad and fundamental one, namely, whether Section 6(c) of the Administrative Procedure Act permits a federal administrative agency to adopt a general policy which makes relevant and material expert evidence unavailable unless the expert witness possessed of it voluntarily agrees to appear and testify. We submit that the Court of Appeals erroneously answered this question in the affirmative, and that for the rea-

sons set forth in the Petition for Certiorari it is a question that should be squarely considered and answered by this Court.

Respectfully,

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Dated: January 5, 1962

CERTIFICATE OF COUNSEL

I, Bryce Rea, Jr., certify pursuant to Rule 58 of this Court that this Petition for Rehearing is presented in good faith and not for delay and is restricted to the ground set forth herein, namely, that it appears from the opinion dissenting from the order denying certiorari that this Court did not squarely consider the fundamental question presented by the Petition for Certiorari.

BRYCE REA, JR.